No. 16,062

United States Court of Appeals

For the Ninth Circuit

JAMES N. GREEAR,
Appellant,

vs.

MARY SCHAAF GREEAR,
Appellee.

Appeal from the United States District Court for the District of Nevada.

OPENING BRIEF OF APPELLANT.

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I. STATEMENT OF FACTS.

The above named parties, while husband and wife, entered into an agreement under date of July 13, 1949, settling among other things the right of the wife to alimony and support. The agreement, so far as this appeal is concerned, provides for monthly support payments by the husband to the wife of $500 per month if the wife does not have to pay income tax on this sum, and $600 per month if she does have to pay income tax and then reads as follows:

> "However, if and when the husband's annual *'net income' (meaning by that phrase his gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income, tax payments by him for that year)* is

less than Seventeen Thousand Five Hundred ($17,500.00) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred ($500.00) Dollars or Six Hundred ($600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred ($17,500) Dollars bears to the husband's annual 'net income' during said immediately preceding calendar year in which his 'net income' is less than Seventeen Thousand Five Hundred ($17,-500) Dollars, but the minimum payments shall be Three Hundred ($300) Dollars per month as long as the husband's annual 'net income' equals or exceeds Seven Thousand Two Hundred ($7,-200) Dollars per calendar year, and whenever the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred ($17,500) Dollars in any calendar year, the monthly payments to the wife for that year and each and every succeeding year in which the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred ($17,500) Dollars shall be Five Hundred ($500) Dollars or Six Hundred ($600) Dollars per month (whichever amount is then applicable according to the above provisions in relation to income taxes thereon) on the fifth day of each and every month commencing as of the fifth day of January of each of the years involved. *If, by reason of ill health, or any other cause, the husband's annual 'net income' should be less than Seven Thousand Two Hundred ($7,200) Dollars per year, the rate of monthly payments by the husband to the wife shall be one-half of his annual 'net income',* except that if that event occurs at any time during

the time the husband is obligated for the support, maintenance and education of their two minor children or either of them, as hereinafter provided in paragraphs 5 and 6 of this agreement, the payments by the husband to the wife shall be reduced to one-third of his annual 'net income' during the period of time that he is so obligated for the support, maintenance and education of their said children or either of them. Whenever the husband's annual 'net income' is less than Seventeen Thousand Five Hundred ($17,500) Dollars in any calendar year or less than Seven Thousand Two Hundred ($7,200) Dollars in any calendar year, the husband shall furnish the wife, her agent or attorney, an itemized statement of his annual 'net income' and shall permit the wife, her agent or attorney, to make a detailed examination and audit of his books and records and income tax returns for the calendar years involved for the purpose of determining the accuracy of the itemized statement furnished by the husband to the wife, her agent or attorney. The wife agrees to sign a joint income tax return with the husband, at his request, until such time as she is required to make a separate return and pay a separate income tax on the money paid by the husband to her." (Emphasis added.)

Appellant obtained a divorce from appellee in Nevada in July, 1950; remarried; and since then has resided and practiced medicine in Nevada. (Tr. 40.) Although apparently no specific finding of fact was made as to the date of remarriage, it is not disputed that this remarriage occurred on June 16, 1951, and has been in effect from that date to the present time.

In filling out his income tax returns for the years herein involved, namely, 1952 to 1955, inclusive, appellant deducted from his income taxes as usual and ordinary expenses the following:

"Dues and memberships
Entertainment
Medical meetings
Medical journals
Professional insurance
Interest
Auto expense
Depreciation" (Tr. 134.)

At the time appellant signed the agreement of July 13, 1949, he was a member of a partnership which paid certain of the expenses such as office rent, secretarial help, etc., but each partner paid on the items mentioned in the preceding paragraph out of his share of the partnership income. (Tr. 105-106.)

In preparing the returns for the years herein involved the accountants excluded the separate income of Mrs. Greear and it is not disputed that during these years she had no community earnings as such. It is further undisputed that the income of appellant for the years in question, with insignificant exceptions, was from professional fees from his practice as a doctor specializing in the treatment of the eyes. The income for the years in question is shown in appellee's Exhibit 4 with all expenses deducted, and in appellee's Exhibit 5 with all except those expenses indicated above being included. (Tr. 128-136 inc.)

II. ISSUES.

1. Is the income shown in appellee's Exhibits 4 and 5 community property of appellant and his present wife?

2. If it is community property, should the present wife's share be included in determining "net income" as defined in the agreement of July 13, 1949?

3. Is appellant in fixing "usual, ordinary and reasonable office expenses" limited to the expenses which were paid by the partnership of which he was a member at the time he signed the agreement?

III. ARGUMENT.

PRELIMINARY DISCUSSION.

Preliminarily it is the position of appellant that the question truly involved is not one of interpreting the words in the agreement but rather of determining the property upon which the agreement should operate. The ownership of the property is a matter of law and must be determined by the laws of the State of Nevada where the appellant is domiciled.

41 *C.J.S.* 998 states as follows:

> "Whether particular property is community or separate is a matter of law, and it is not dependent on the declaration or intention of the parties as to its status. The character of property as separate or community is fixed at the time of its acquisition and by the facts surrounding the transaction in which it was acquired, whether the property is realty or personalty."

In 11 *Am. Jur.* 991 we read as follows:

"As a general rule, the law of the matrimonial domicile controls the property rights of husband and wife * * *."

ISSUE I. THE INCOME OF APPELLANT FROM HIS EARNINGS FOR THE PERIOD OF TIME 1952-1955 IS THE COMMUNITY PROPERTY OF APPELLANT AND HIS PRESENT WIFE.

Nevada law provides as follows:

Nevada Revised Statutes, Section 123.130:

"Separate Property of Wife, Husband.

1. All property of the wife owned by her before her marriage, and that acquired by her afterwards by gift, bequest, devise or descent, with the rent, issues and profits thereof, is her separate property.

2. All property of the husband owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property."

N.R.S. Section 123.180:

"Earnings of wife and minor children, when living separate, separate property of wife. The earnings and accumulations of the wife and of her minor children, living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

N.R.S. Section 123.190:

"Earnings of wife appropriated to her use with husband's consent deemed a gift. When the husband has allowed the wife to appropriate to her

own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property."

N.R.S. Section 123.220:

"*Community property defined.* All property, other than that stated in NRS 123.130, acquired after marriage by either husband or wife, or both, except as provided in NRS 123.180 and 123.190 is community property."

N.R.S. Section 123.230:

"*Husband controls community property.* The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as provided in this chapter, as of his own separate estate; provided:

1. That no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real property.

2. That the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like power of disposition thereof, when the earnings and accumulations are used for the care and maintenance of the family."

N.R.S. Section 123.250:

"*Death of spouse; ownership of survivor; disposal by will of decedent.* Upon the death of

> either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of NRS 123.260."

From a reading of the foregoing it is clear that the earnings of appellant involved in this case are community property. The interest of the present wife of the appellant in such community property is a vested interest under the laws of the State of Nevada. *In re Williams Estate,* 161 P. 741, 40 Nev. 241; *Katson v. Katson,* 43 N. Mex. 214, 89 P. 2d 524; *In re Caswell's Estate,* 105 Cal. App. 475, 288 P. 102.

ISSUE II. THE WIFE'S SHARE OF THE INCOME OF APPELLANT FOUND TO BE COMMUNITY PROPERTY SHOULD NOT BE INCLUDED IN THE "NET INCOME" OF APPELLANT AS DEFINED IN THE AGREEMENT OF JULY 13, 1949.

The wife's interest is a vested one at the moment of acquisition of the property. *In re Williams Estate,* 161 P. 741, 40 Nev. 241; *In re Monaghan's Estate,* 60 Ariz. 342, 137 P. 2d 393; *DuPont Company v. Garrison,* 13 Wash. 2d 170, 124 P. 2d 939; *Pendleton v. Brown,* 25 Ariz. 604, 221 P. 213; *Internal Revenue Bulletin,* C.B. 1955-2, pp. 382-383, Rev. Rel. 55-605.

The mere fact the husband has the control and management of the community property in no way detracts from the wife's ownership of this property. *Schramm v. Steele,* 97 Wash. 309, 166 P. 634, 637; *In re Williams Estate,* 40 Nev. 241, 261, 161 P. 741.

Where there is no ambiguity in the instrument the intent of the parties must be determined from what the parties said in the instrument, not from what they had in their minds when signing it. *Williston on Contracts,* Vol. 3, Sec. 310; 17 *C.J.S.* 702; *Frensley v. White,* 208 Okla. 209, 254 P. 2d 982; *Barlow v. Makeeff,* 74 Wyo. 171, 284 P. 2d 1093.

The marital community is in essence a form of partnership wherein the husband is a managing partner, but the ownership rights to the property are community rights. *de Funiak, Community Property,* Vol. 1, p. 265; 11 *Am. Jur.* 179.

Following the foregoing principles it was error for the trial court to interpret the agreement as it did because in so interpreting it it used as a guide property which did not belong to appellant and over which he had no power except as the managing agent of the community partnership. Certainly if his wife had separate property which she gave to him to manage it could not be used as a guide for any agreement he might have entered into with his former wife. The theory of community property law is that the wife, by her efforts as a homemaker in some cases and in other cases by actually bringing home earnings to the community, contributes her share of energy and thought to the progress of the community and therefore is entitled to equal shares in the income and the property acquired therefrom.

If the parties had meant to use Dr. Greear's earnings as the measuring stick without regard to his

earnings going into a partnership or not, they could have said so. At the time of entering into the agreement he was in fact in a partnership where conceivably his earnings could have been much greater than the partnership income either because he worked harder, was better-known as a specialist, or because one of his partners may have been ill and unable to work. Certainly in the event of any of these contingencies the income of the other partner could not have been used either to pay the former Mrs. Greear's alimony or as a measuring device to determine what would be fair for appellant to pay the former Mrs. Greear. Not having referred to his earnings in the previous agreement, it is improper for the appellee here to seek to force alimony payments upon appellant based upon the earnings of appellant without regard to whether it is community or separate property.

Perhaps an example would best illustrate appellant's position. Assume Dr. Greear had not remarried but had entered into a partnership with another doctor where they shared their earnings equally. Assume that the other doctor became so ill he was unable to work so that for some years the earnings of the partnership were solely the earnings of Dr. Greear, but because of the partnership contract he had to continue to put all of his earnings into the partnership income, only one-half of which would be Dr. Greear's net income. Then it would obviously be grossly unfair for his former wife to try and use total partnership income as the "net income" of Dr. Greear. Even if "net income" could be interpreted to mean "earn-

ings'' assuming one-half of his earnings belonged to someone else, as is the case here, it would be very possible that the ridiculous result could obtain that Dr. Greear would not earn enough to even make his payments to his ex-wife.

The only case presented to the trial court touching squarely on the problem here involved is the case of *Alexander v. Alexander,* 64 Fed. Supp. 123 and was on appeal 158 Fed. 2d 429. It is appellant's position here that the dissenting opinion in that case contains the better reasoning. Also that the concurring opinion in that case seems to be based upon the fact that in that case, although the husband was in fact residing in Texas, at the time he executed the agreement the agreement recited he was a resident of Missouri and the concurring Judge therefore concluded that clearly the agreement would have to be interpreted by Missouri law.

The holding in that case, it is submitted, insofar as it is in conflict with appellant's position in this case, is not sound law and should not be followed. The error of the Court in that case, it is submitted, comes from a failure to properly understand the nature of the community property system, and for a correct understanding of this system the Court's attention is invited to 11 *Am. Jur.* 178, 41 *C.J.S.* 986, and *de Funiak, Community Property,* Vol. 1, p. 299.

ISSUE III. THE "USUAL, ORDINARY AND REASONABLE OFFICE EXPENSES" CANNOT BE HELD TO BE LIMITED ONLY TO THE EXPENSES PAID BY THE PARTNERSHIP OF WHICH APPELLANT WAS A MEMBER AT THE TIME THE AGREEMENT WAS SIGNED.

It would seem that citation of authority is not necessary to determine the above proposition.

The words "usual, ordinary and reasonable office expenses" have a fixed meaning in our society today, particularly when read in the over-all context of the agreement which permits the deduction of income tax payments in addition to these expenses. Certainly if the Federal Government would permit the deduction of the expenses referred to in the Statement of Facts, which were disallowed by the trial court, they were directly connected with and incident to his over-all income from which appellee receives her support payments.

The items therein listed are, it is submitted, under the law usual, ordinary and reasonable office expenses and the mere fact that the partnership of which appellant was a member at the time the agreement was signed chose not to have the partnership pay these expenses but rather have each individual pay them has no bearing upon the instant situation because if it were the thought of the parties to limit these expenses to those paid for by the partnership at the time the agreement was entered into they could easily have said so. To hold otherwise would mean that the written agreement is being altered by adding to it something which is not therein written, and furthermore would have to be based upon the claim that the

agreement contemplated that Dr. Greear would remain in the partnership he was then in for the rest of his days. This is neither feasible nor justified by a reading of the agreement.

CONCLUSION.

1. The decision of the trial court insofar as it requires appellant to include community income in computing the monies payable to appellee is in error and judgment should be entered that only appellant's share of the community income should be included in computing these amounts.

2. The items of expenses, to-wit, dues and memberships, entertainment, medical meetings and medical journals, professional insurance, interest, auto expense and depreciation, should be allowed to appellant before any amounts due appellee are computed.

Dated, Reno, Nevada,
November 12, 1958.

Respectfully submitted,
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